

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	Docket#	
MARGARITA DELGADO, et al.,	:	13-cv-4427-NGG-RML
Plaintiff,	:	
	:	
- versus -	:	U.S. Courthouse
	:	Brooklyn, New York
	:	
OCWEN LOAN SERVICING, LLC,	:	
et al.,	:	June 18, 2015
Defendant	:	
-----X		

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

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1 THE COURT: This is docket number 13-cv-4427,
2 Delgado v. Ocwen. Will counsel please state their
3 appearances for the record.

4 MR. WITTELS: Steven Wittels from Wittels Law
5 for the plaintiffs.

6 MR. MCINTURFF: Burkett McInturff for the
7 plaintiffs from Wittels law.

8 MS. PALIKOVIC: Tiasha Palikovic from Witells
9 Law for plaintiffs.

10 THE COURT: Could you spell your name for the
11 record, please?

12 . MS. PALIKOVIC: T-I-A-S-H-A P-A-L-I-K-O-V-I-C.

13 THE COURT: Thank you.

14 MR. ALEXANDER: Bruce Alexander for Cross
15 Country Home Services and Sandra Finn.

16 MR. PREVIN: Matthew Previn for Ocwen Loan
17 Servicing.

18 THE COURT: Okay. Who would like to go first?

19 MR. WITTELS: Well, we're fine going first,
20 your Honor. First, did your Honor have a chance, I know
21 we gave it to you very late, to review our letter
22 submission?

23 THE COURT: I skimmed it but I would say I am
24 not on top of it.

25 MR. WITTELS: Okay. So if I may, I'll just

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1 give you a brief summary of what the issues are today.

2 THE COURT: Right.

3 MR. WITTELS: This obviously is the check
4 solicitation scheme case --

5 THE COURT: Right.

6 MR. WITTELS: -- in which the plaintiffs are
7 alleging that they were deceived by solicitation checks
8 sent to them by the enterprise composed of Cross Country
9 and Ocwen. Ocwen gives its list of customer names out to
10 Cross Country and is part of the inducement by Cross
11 Country to do so. Ocwen will receive, we call it a
12 kickback, they call it a premium, for giving out their
13 names of their customers.

14 They then -- Ocwen -- excuse me, Cross Country
15 then sends what we allege is a deceptive check with
16 tendered material to the customers and they cash it and
17 find out months later, for the most part, from our
18 plaintiffs that they've been enrolled in various warranty
19 or service plans that are set up by Cross Country.

20 We've had motion practice on this extensively
21 in front of Judge Garaufis and he issued a decision
22 denying in great part, the defendant's motion to dismiss.
23 He sustained our RICO count and various consumer fraud
24 counts for California and New York.

25 At the time, the four named plaintiffs who are

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1 listed actually on the case management order, were the
2 only four plaintiffs. We've since added 26 more
3 plaintiffs who represent 18 total states now, alleging
4 various state law claims in addition to the RICO claim we
5 had initially.

6 As your Honor will recall from the last case
7 management order, well, the first one that was entered in
8 November, that ensued after we had had conferences with
9 your Honor and discussed how we were going to proceed
10 going forward in terms of discovery and thereafter we
11 finally entered a ESI protocol that your Honor entered
12 and that was again the result of long negotiations with
13 the defendants and the propriety of it. And we had
14 experts on the phone. We actually had one here from our
15 side to describe why we should obtain the protocol we
16 wanted.

17 Since that time of the ESI protocol being
18 entered, the parties have still been negotiating ESI in
19 terms of the number of custodians, the names of the
20 custodians, and that is I believe winding down to where
21 we hope to get the set request that will be put into the
22 mix for the discovery by -- in the next two weeks,
23 hopefully -- one to two weeks.

24 The issues today that we would like your Honor
25 to address are first regarding a discovery dispute that

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1 we have with Cross Country concerning non-check
2 solicitations. That's just the topic.

3 The second topic is the scope of what
4 plaintiff's depositions will look like. The defendants
5 are asking for all 30 at this time and the third issue is
6 -- we want to bring up is the discovery cutoff which
7 under the current order is -- under number 12 of this
8 case management plan is August 30th. And we would like
9 to have an extension of that and discuss that with you.

10 By way of one of one other issue of background
11 that we addressed briefly in the letter that we sent to
12 you, defendants have moved to dismiss in great part, many
13 of the added claims brought by the 18 plaintiffs in the
14 different states. They filed a motion, I think it was
15 May 21, so somewhat recently here, less than a month ago,
16 and our response would -- under an order that would --
17 well, under a schedule that we had entered before we had
18 gotten the motion was early July, July 3rd. We asked the
19 defendants to consent to a brief extension I think of 28
20 days, just under a month and they've taken that -- and
21 said no, but they've taken it under advisement, I think
22 contingent upon how we work out our schedule today. So
23 that's an issue that's hanging out there. We need a
24 little extra time. You know, they've not only filed a
25 motion to dismiss but they've also filed a motion to

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1 compel arbitration that was not discussed with your Honor
2 last time but was brought up with Judge Garaufis where
3 they said they have arbitration provisions that they felt
4 compelled arbitration.

5 We feel those arbitration provisions that they
6 have are invalid for a number of reasons, most of all the
7 clients didn't -- our customers never knew they were
8 enrolled in any plans and there's no assent that is
9 mandatory under the Second Circuit and other law. So we
10 don't think that motion will succeed but we are briefing
11 both those motions.

12 So the first issue is a discovery dispute
13 concerning non-solicitation checks and just to give you a
14 brief overview again, the solicitation check -- I don't
15 know if we showed you a copy last time but it's attached
16 to our complaint, it comes in an envelope, sort of a tear
17 open envelope and on the outside it says Ocwen. So the
18 customer receiving it, who is an Ocwen loan mortgage
19 customer, thinks it's from Ocwen, opens it up and there's
20 a check, some other promotional solicitation material and
21 signs the check. It's \$250 or \$350. Signs the back.
22 Cashes it, thinking it's a refund or an overage of his
23 mortgage payments.

24 What we've now learned from the first wave of
25 written -- of hard copy discovery that was given to us by

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1 the parties -- by the defendants, is that Cross Country
2 did an extensive analysis and survey of how fruitful,
3 probably is the best word, the check solicitation type of
4 mail promotion would work as compared to non-check
5 solicitations. Non-check solicitations mean a direct
6 mail to a customer where they would have to take
7 affirmative action to say I want to sign up for this
8 warranty plan you're giving me, as opposed to signing a
9 check and suddenly finding themselves enrolled. Taking
10 action.

11 In other words, if you don't do anything,
12 you're not enrolled. That's the typical sort of
13 marketing that one expects that we allege is the
14 deception here because this is their scheme. It's a
15 trick. It's an artifice to get people to sign up for
16 this. That's what our experts will say. That's what the
17 Ninth Circuit has said. That's what attorney generals
18 all over the country have said. This is not some fair
19 way of dealing with customers and that's been repeatedly
20 stated by attorney generals in virtually every state.
21 There have been major settlements throughout the country
22 and the Ninth Circuit said that in an almost identical
23 check solicitation scheme that they affirmed where the
24 FTC won many millions of dollars for customers who were
25 unwittingly signed up who signed the checks.

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1 So the question here, and I'm going to ask
2 permission for my colleague Burkett McInturff to address
3 it, is whether we are entitled from Cross Country to non-
4 check solicitation materials that we have learned about
5 in the first instance from the discovery that they've
6 produced because just briefly, when Cross Country decided
7 what type of marketing to do, it did very extensive
8 analysis and Burkett will get into it of what the -- we
9 can take you through the document but of how effective
10 the check solicitation would be versus non-check. They
11 gave us this document. It's relevant. It's producible
12 and now we want the information regarding the non-checks
13 and they're arguing against it. So if I can turn that
14 over to Mr. McInturff.

15 THE COURT: Sure.

16 MR. WITTELS: Thank you.

17 MR. MCINTURFF: A little bit more background.
18 Cross Country's offerings are warranty and service plans.
19 You have to call and make a claim, say your appliance is
20 broken or your HVAC is not working. And they, as my
21 colleague, Mr. Wittels said, they use a variety of means
22 to market these programs. They also track data such as
23 how long a customer stays in a program and why the
24 customer decides to leave.

25 They've produced data for their check

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1 solicitations that show that customers in the thousands
2 are disputing that they ever enrolled in the first place.
3 They've also produced data showing that the -- and I can
4 show you this, that the profitability meaning the amount
5 of premiums paid by consumers, versus the amount of
6 claims paid out by the company of the check solicitation
7 and in this particular case it's about four times as
8 profitable.

9 So we're looking for data related to the non-
10 check campaigns. They call them campaigns because they
11 do them in sort of a big push. We're looking for data
12 related to the non-check campaigns because we feel that
13 it's almost a survey in and of itself for a scientific
14 experiment in and of itself to look at how consumers are
15 responding to the non-check campaigns, if they are four
16 times less profitable, are consumers reacting differently
17 and that will help us show that this conduct is
18 misleading and fraudulent.

19 In addition, this information will be very
20 relevant to our expert because our expert will talk about
21 consumer perception and what numbers like this indicate.
22 So we think it's relevant data. We've offered to Cross
23 Country to confer with them to reduce any burden. We're
24 not looking for massive amounts of documents. We're
25 looking for basically downloads from databases which

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1 Cross Country has shown that they can do. These are
2 Cross Country's responses to our interrogatories where
3 Cross Country went through -- went to their customer data
4 base. This is an example, would be their customer data
5 base for reasons consumers decided to cancel and here's
6 one example: this is consumers who dispute enrollment
7 authorization. This is for the check campaign. There's
8 nearly 8,000 consumers called Cross Country and said I
9 didn't enroll in this.

10 And so we would like to see data, for example,
11 for the non-check campaigns, to see what the numbers are
12 concerning consumers who dispute enrollment. There's
13 other pertinent data here and so we don't think it's
14 terribly burdensome because Cross Country's already done
15 it for its check campaign.

16 THE COURT: So what level of detail are you
17 looking for?

18 MR. MCINTURFF: As I said, basically downloads
19 of certain statistical data that the company keeps which
20 we've seen that they keep it for check customers and we
21 believe it's kept for non-check customers and again,
22 we'll offer to confer with Cross Country to narrow the
23 data, so that it's not overly burdensome. We're not
24 asking for communications necessarily. We're not asking
25 for marketing documents. It's simply -- well, we would

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1 ask for a limited number of marketing documents, so that
2 our expert could look at and compare what consumers
3 perceive from the non-check marketing.

4 THE COURT: Statistical data similar to the
5 kinds on this chart?

6 MR. MCINTURFF: Correct. This is reasons for
7 cancellations. We would also want percentages of -- so
8 the company tracks a metric called response rate which is
9 if you mail out the check to 600,000 customers and a
10 certain percentage responds, that's the response rate.
11 We're looking for the response rate of the non-check
12 campaigns because data produced to date shows that the
13 check campaign, aside from being much more profitable, is
14 also -- has a much higher response rate. Consumers are
15 opting in at much higher levels.

16 And then we would look for data concerning how
17 long a consumer remains on a plan. So Cross Country,
18 it's plaintiff's position that Cross Country's consumers
19 who are Ocwen's customers who are enrolled through a
20 check, stay on the plan a very limited number of time,
21 basically until they see the charge on their Ocwen bill.
22 Then they call and dispute enrollment and cancel.

23 A consumer who knowingly entered into a --
24 basically an insurance-like product, we would expect that
25 they would stay on the product for longer than three to

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1 four months, five months, and that when they canceled,
2 they wouldn't cancel because they disputed enrollment.
3 They would cancel because they were for some other
4 reason, unsatisfied.

5 THE COURT: Uh-hum.

6 MR. MCINTURFF: So we think the data is
7 germane. We also think that Cross Country has put the
8 data at issue because in the documents that Cross
9 Country's already produced, it shows that the relevant
10 employees at the company are comparing the effectiveness
11 of the campaigns in making decisions in terms of which
12 campaigns to use, also in terms of how much of a premium
13 to pay Ocwen for the use of Ocwen's logo and customer
14 lists.

15 THE COURT: All right.

16 MR. WITTELS: To follow-up on what Mr.
17 McInturff said, we've already given the questions to
18 them. In paragraph 3, we asked -- this is where we got
19 the chart. We first asked, this is -- sorry -- number 3
20 of our second set of interrogatories. We asked for each
21 non-check solicitation campaign for Ocwen to provide the
22 following info: number of Ocwen customers solicited and
23 the campaigns response (indiscernible). They object to
24 that. Whereas they had given us that data for the check
25 solicitation information.

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1 Then in paragraph --

2 MR. MCINTURFF: This is -- if I may interrupt,
3 this is the response rate for the check campaigns.

4 MR. WITTELS: Yes. So then they have all that
5 data. This is something that obviously Cross Country
6 supposedly looks at, because that's their business of
7 seeing how effective their marketing is to get people
8 enrolled in their different warranty and service plans.

9 We asked in question -- I think this is
10 question 4, if we're --

11 THE COURT: So the objection is on relevance
12 grounds largely, right?

13 MR. WITTELS: Correct.

14 THE COURT: And you're saying it's relevant
15 because --

16 MR. MCINTURFF: It tends to prove -- it will
17 serve as a control for us to be able to show that the --
18 this vastly more effective and vastly more profitable
19 marketing mechanism is, in fact, deceptive.

20 THE COURT: Right.

21 MR. WITTELS: As compared -- and for example,
22 here we ask for the proof of enrollment request. That
23 term is a term of art from Cross Country where people who
24 call up and say I didn't enroll in this, why am I getting
25 billed by Ocwen, this \$44.95 a month or whoever much

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1 they're getting billed. The company says well, Ocwen --
2 you first call Ocwen and Ocwen says well, it's not us,
3 and the customer says what do you mean it's not you? And
4 by the way, we know this is how it operates and we're
5 going to get to this in the second part of this
6 discussion today -- we know this is how it operates
7 because Cross Country has recorded all of the client's
8 calls complaining, including our named plaintiffs, the
9 Delgados.

10 They called up Ocwen, the loan service unit and
11 said what's this on my bill? The company says it's a
12 charge. Well, who is it from? What's it about? And
13 then they pass them on to Cross Country, a company
14 they've never heard of and Cross Country starts telling
15 them oh, well, you have enrolled. How's that? Well, let
16 me give you our proof of enrollment.

17 So then they send them the check and say you
18 enrolled and the customer and like our plaintiffs, the
19 Delgados said, what are you talking about. You know, I
20 signed a check for -- it was a refund. And it's all on
21 tape, so we know this.

22 So we asked here in question, I think this was
23 4, provide the proof of enrollment request issued for the
24 customers who cashed the check because they had told us
25 from the first interrogatories, 55,000 customers. Then

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1 we asked for the Ocwen customers who enrolled in a Cross
2 Country plan without a solicitation check, broken down by
3 the marketing method used and they gave us the
4 information for those who were done by -- who enrolled by
5 solicitation but for the non -- without a solicitation
6 check. So that's another issue we're looking for which
7 is 5(ii).

8 And then on 6, again it's related to -- they
9 have a data base where we showed you -- accounts
10 receivable transactions database, they set up where they
11 record when someone calls up what the customer is calling
12 about. And here we know with respect to check
13 solicitations and the 55,000 who cashed it, that there
14 were many, many calls regarding dispute authorization.
15 Another big category was non-payment. We have to ask
16 them a little bit more about some of these terms but
17 billing vehicle no longer available, 17,000 people. That
18 seems to be people maybe who no longer had the house or
19 the mortgage.

20 So we want that data for those who enrolled in
21 a Cross Country plan without a check solicitation broken
22 down by the marketing method, because they used
23 telemarketing, they used direct mail, they used --

24 MR. MCINTURFF: And statement marketings that
25 they would send along with Ocwen's monthly mortgage

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1 statement, they would include a solicitation pitch in the
2 statement.

3 MR. WITTELS: We want the chart answer for
4 this.

5 THE COURT: Right. So

6 MR. ALEXANDER: I'll (indiscernible) the rest
7 of the story, your Honor.

8 THE COURT: Slowly.

9 MR. ALEXANDER: This is an exercise of getting
10 very, very far afield. The standard we have here is
11 whether the material that the plaintiffs signed and
12 deposited was objectively deceptive or misleading and
13 they keep talking about something that's grasped grossly
14 more profitable, something that's grossly more effective
15 that has nothing to do with whether the marketing
16 material is objectively misleading or not.

17 They are trying to get into this information
18 for some purpose that is not apparent to me but I think
19 is going to yield a lot of false positives and let's just
20 talk about one. They talk about how the enrollment is
21 much more effective for a check marketing than otherwise,
22 as a posit. There's are lots of different other kinds of
23 marketing and how comparable they are is highly dubious
24 but let's just talk about the objective evidence that we
25 have before that we've produced here.

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1 More than 90,000 people in the relevant time
2 frame cashed one of these checks. More than 30,000
3 canceled before ever paying anything. They full knew
4 well what was happening. They had something. They got a
5 chance to get a couple of bucks for free, they cashed it
6 and then they canceled. They knew exactly what was going
7 on.

8 The response rates for these programs that they
9 say are so grossly more effective, 97 or 98 percent of
10 the people do not respond at all. So you're talking
11 about very small percentages of people who receive this
12 material who do anything with it at all.

13 Then he said that well, we want to know about
14 the cancellation because people, as soon as they figure
15 out that they're in this program, they cancel. So we
16 want to know how long they stay on the programs. We've
17 already given them information that there are more people
18 who renewed with this program after getting a separate
19 notice than don't.

20 So it is hard for my client to understand how
21 any of this information leads reasonably to the discovery
22 of evidence that bears on a claim or defense in this
23 case. That whether it's telemarketing and they're not
24 even given anything to look at, whether it is something
25 that a company's -- a statement that is not arriving

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1 separately. The relationship -- they say that this works
2 as a baseline but you have to be able to establish that
3 the baseline has comparability and that the baseline
4 shows some similarities and your Honor, they have not
5 shown this at all.

6 And they cannot show comparatively --
7 comparability. I mean this information is going to lead
8 to all kinds of separate, rabbit-hole disputes about
9 well, the fact that these people kept the program for
10 this long and these people didn't keep the program for
11 this long.

12 Well, it may indicate that the reason for the
13 high enrollment -- so-called high enrollment is that the
14 people -- most of the people, a good percentage of the
15 people who choose -- who bothered to choose, fully
16 understand exactly what's going on and that's why they
17 cancel right away. And it's the people who are careless,
18 who don't bother to read, who sign their name to a check
19 without bothering to see what the endorsement or the
20 accompanying material means. So that's what the issue is
21 going to be. And so where we're going with this other
22 discovery is really to our point of view, pretty far off
23 the main path here.

24 THE COURT: Well, you know, as happens with a
25 lot of these discovery issues they really do require an

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1 analysis of the merits and whose argument is more
2 powerful on the merits and I think each side is arguing
3 somewhat differently as to how the Court should be
4 looking at the merits of the case and the discovery that
5 leads to it would -- well, the question really is by
6 precluding an avenue of discovery, am I precluding an
7 argument that the Court should be considering when
8 looking at the merits. That's -- and I think you're
9 essentially saying that the plaintiff's argument doesn't
10 hold any water, that the comparison of these two
11 different --

12 MR. ALEXANDER: I don't see how they show it.
13 They -- basically they're saying, your Honor, it's more
14 profitable, it's more effective and therefore, it's
15 deceptive. They string those terms together in the same
16 sentence and they're completely unrelated.

17 THE COURT: All right. So you're saying the
18 motive, the reason why someone would want to do this is
19 different from what is deceptive.

20 MR. ALEXANDER: Whether it's objectively --
21 yeah.

22 MR. PREVIN: Your Honor, just very briefly, if
23 I may, just point out maybe the obvious that that class
24 definition very explicitly is limited to enrollment in
25 check solicitation programs. So they are asking very

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1 explicitly for information that is not relevant to the
2 class claims and the -- as I think you effectively
3 captured the fundamental issue, that the motive has
4 nothing to do with whether or not the solicitation
5 materials were deceptive. That's an objective standard
6 and either Judge Garaufis will decide it or a jury will
7 decide the issue but it's not going to hinge on whether
8 or not the solicitation was profitable.

9 MR. WITTELS: It's not only a matter of profit
10 and they're pointing that out because that's really all
11 we -- that's one factor we know about. Let's start with
12 the fact that their own analysis, Cross Country's
13 analysis in the document that they've produced shows --
14 it cries out that it's relevant because they're analyzing
15 it -- you can look here, your Honor, the check -- this is
16 their different campaigns and this is an e-mail in 2012,
17 just when they were getting really geared up for sending
18 out a lot of these, they did it I think from 2009, but
19 they compare values claims costs. This is what it's --

20 MR. MCINTURFF: That's what they pay out to
21 claims.

22 MR. WITTELS: -- what they pay out on claims in
23 check versus non-checks. So the defendants themselves
24 think it's germane, the comparison. So for them to sit
25 here and say it has no relevance is just belied by their

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1 own document.

2 Their own people are analyzing how effective
3 check solicitations are versus non-check. If they were
4 getting as high a rate with non-check solicitations to
5 get customers to go into these warranty plans, do you
6 think they'd really bother sending out checks and -- of
7 course not, wouldn't do it that way because again, the
8 Ninth Circuit says it's a scam. I mean, you can read the
9 decision.

10 THE COURT: Well, let's assume it's deceptive
11 hypothetically, okay?

12 MR. ALEXANDER: Thank you.

13 THE COURT: How does the motive -- in other
14 words, how does this comparison fit into your analysis of
15 the deception?

16 MR. MCINTURFF: If I can challenge the
17 assumption because the -- we have to prove it's
18 deceptive --

19 THE COURT: Right.

20 MR. MCINTURFF: -- and if consumers are -- say
21 for example, for telemarketing or for the direct mail
22 campaigns, if they're not canceling it as high a rates
23 and they're not disputing enrollment, they're not saying
24 how did I get signed up to this, that tends to show that
25 the other mechanism, the check is deceptive. So that's

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1 really what we're going after.

2 And we're going to employ a marketing expert
3 and the way marketing experts work is they try to
4 recreate the circumstances under which the consumer would
5 have made this decision and they -- it's basically a
6 scientific study where they control for various factors.
7 They would control, say for example, for the length of
8 time that the consumer was allowed to read the material.
9 They would control for colors, different logos, such
10 things.

11 This is very pertinent information for our
12 expert because Cross Country has its own internal data
13 that is itself relevant. Basically, it's its own study.
14 It's comparing its other marketing materials to its check
15 campaigns and we think that that is relevant because it
16 will go to show deceptiveness.

17 For example, in the Ninth Circuit, when the
18 Ninth Circuit ruled that a very similar check campaign
19 was deceptive, they relied on the fact that consumers
20 used the product at a very low rate. So if we have a
21 lower usage rate of check -- enrollees via check versus
22 enrollees from non-check campaigns, that will help us
23 prove our case.

24 MR. PREVIN: Your Honor, if I may just very
25 briefly, I do want to make this Ninth Circuit case that

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1 is referenced -- --

2 MR. ALEXANDER: Yeah.

3 MR. PREVIN: It did not hold that check
4 solicitations are per say deceptive. It involved a
5 different company with different disclosures that the
6 Ninth Circuit concluded were deficient. That's a
7 different -- you know, it does not stand for the
8 proposition that plaintiffs are suggesting it does and we
9 don't need to resolve that now but I do want the record
10 to be clear that there is no case law that stands for the
11 proposition.

12 MR. ALEXANDER: To the contrary, your Honor,
13 that court opined about the various kinds of disclosures
14 that it thought would be appropriate and then the
15 question is whether these disclosures measure up to that,
16 as opposed to no disclosures at all. So, I mean it's a
17 much different situation than you're being presented at
18 this particular point.

19 But in further point, I mean any business who
20 is trying to run a business is going to keep track of its
21 performance and different kinds of categories. The
22 question is not whether some things are effective. If it
23 was designed to be a deceptive program only because it
24 was so effective and so money making, why do anything
25 else? I mean that sort of begs the question really.

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1 Their argument really begs to say well, why would we do
2 anything else if this is so successful, if our measure of
3 how we're going to do our business is only going to do
4 this, that they use a variety of marketing techniques
5 precisely for the purpose of reaching different kinds of
6 customers because no one really knows what they're doing
7 and so they keep records about this but the question is
8 not whether it's effective, the question is not whether
9 it's enrollment.

10 We're going to be arguing about whether people
11 enrolled, and then canceled because they knew everything
12 that was about it, whether they enrolled and then more of
13 them actually re-enrolled after a year, not necessarily
14 within a few months but after a year. It's going to be
15 about whether a fairly small number of participants
16 comparatively -- now they're going to say it's thousands.

17 THE COURT: Excuse me just a second.

18 MR. ALEXANDER: Sure.

19 (Pause)

20 THE COURT: All right. I'm going to have to
21 take this call. You won't have to move at all and then
22 I'll be able to give you more uninterrupted time here.

23 MR. ALEXANDER: Thank you very much, your
24 Honor.

25 (Off the record)

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1 THE COURT: All right. So let me just ask you
2 a couple of questions. We've looked at the relevance
3 benefit side. Tell me about the burden.

4 MR. ALEXANDER: There have been hundreds of
5 marketing campaigns during the -- more than a hundred,
6 I'm sorry, not hundreds, but more than a hundred, most of
7 which are not check solicitations. Now I don't know
8 exactly what the names are -- the numbers are but there
9 are more non-check solicitations and many of them are
10 telemarketing, where they're not looking at materials.
11 They were talking to somebody over the phone about
12 materials.

13 So we're opening the door to a level of
14 discovery here if we're going to go through this much,
15 much broader than what the complaint is about, which is
16 about these check solicitations that they say are so
17 deceptive.

18 And when you're saying, you know, what is the
19 burden? The burden is just a lot of other stuff that is
20 -- I mean, where do we cut this off, I guess is the
21 question. You know, when you say the burden, I mean are
22 we going to be doing ESI about telemarketing? I mean, it
23 just --

24 THE COURT: So let me hear --

25 MR. ALEXANDER: Yeah.

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1 THE COURT: So what's the least burdensome,
2 most focused way to get the information you need.

3 MR. MCINTURFF: The downloads from their
4 database, the response to a limited number of
5 interrogatories and sample marketing and in the case of
6 telemarketing, call scripts. We think it probably would
7 take a technician an hour to download the relevant
8 information.

9 MR. WITTELS: Well, because they have a
10 cancellation code and database where they record this
11 information and we want -- request for that information
12 and that pop right out here.

13 THE COURT: What time period are we focused on?

14 MR. MCINTURFF: The relevant period for the
15 complaint? It's -- Ocwen began these -- this check
16 campaign in November of 2009 and they ceased shortly
17 after we filed the complaint in the summer of 2013.

18 THE COURT: Okay. Let's assume that what
19 plaintiff is saying, they believe strongly, do you think
20 your IT expert will agree with that, that it's that
21 unburdensome?

22 MR. ALEXANDER: For the gross data on the other
23 programs, probably not that burdensome. Getting the
24 actual marketing materials, when they say a sample --

25 THE COURT: Uh-hum.

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1 MR. ALEXANDER: -- your Honor, there are dozens
2 and dozens of these going back in time and putting those
3 together and pulling the information is not that easy and
4 the scripts for the telemarketing, the same way.

5 I mean, I really -- I can't understand why
6 telemarketing is even part of the discussion. I mean,
7 this is a written offer and now they're talking about
8 verbal communications. I just -- I fail to see any
9 connection at all between the two.

10 MR. WITTELS: It's a marketing method that they
11 used and that's their whole -- the whole case involves
12 marketing, the effectiveness of the marketing. How
13 people respond to what's written, whether what they've
14 put in the offering is objectively misleading or not and
15 that depends on how you present it to the people. How
16 they're doing a telemarketing and the response rate, how
17 people cancel, all of that is germane because that's
18 their whole business is comparing different types of
19 marketing. So it is germane and our experts have told us
20 it's germane. So we do believe that how they did it, the
21 methodology and the scripts -- you know, they also told
22 us at the beginning that it was going to be burdensome to
23 give us all the material regarding their different check
24 solicitations. It turns out that they're pretty uniform.
25 There's very little variation in the few that they used.

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1 The Gold Plan is very similar to the MD Gold Plan.

2 THE COURT: Uh-hum.

3 MR. WITTELS: So I know what counsel's -- I
4 don't think counsel has all the information
5 (indiscernible) as to how many were solicited to Ocwen
6 customers because it seems like there's a limited batch
7 right here in 2012 where they list the campaign and it's
8 not hundreds.

9 THE COURT: Well, starting with telemarketing,
10 do you know for a fact that there was telemarketing, as
11 well as a written solicitation?

12 MR. WITTELS: Yes.

13 MR. MCINTURFF: To Ocwen customers?

14 MR. WITTELS: Yes.

15 MR. MCINTURFF: Yes, we do know that.

16 THE COURT: Okay. Do you have any idea of how
17 significant that was?

18 MR. WITTELS: Meaningful. It wasn't
19 insignificant certainly. There are calendars that the
20 defendants have produced that show the different
21 campaigns during different months and telemarketing is
22 there --

23 MR. MCINTURFF: Along with direct mail.

24 MR. WITTELS: -- along with direct mail.

25 THE COURT: Okay. Do you know for a fact that

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1 telemarketing scripts are not accessible?

2 MR. ALEXANDER: I do not know that for a fact.

3 THE COURT: Okay.

4 MR. ALEXANDER: I do not know that for a fact.

5 I mean, I would be speculating to talk about that, your
6 Honor.

7 THE COURT: So I think what might make sense --
8 well, okay, assuming you get the telemarketing script,
9 what would your dream script say?

10 MR. MCINTURFF: It would fairly apprise a
11 consumer of what they were entering into and by way of
12 background, to enroll through a telemarketing mechanism,
13 a consumer has to do something to manifest assent.

14 THE COURT: Right.

15 MR. MCINTURFF: It might be provide ideally it
16 would -- if they wanted to be the most up front, the
17 would ask the consumer to provide their Ocwen account
18 number.

19 THE COURT: Uh-hum.

20 MR. MCINTURFF: But there may be other
21 manifestations of assent and the script would describe
22 what the consumer was doing and then have them manifest
23 assent in a fashion that was customary within the
24 marketplace.

25 The crux of our claim here is that by having

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1 people manifest assent through a check disguised as a
2 refund from their mortgage company, they don't realize
3 they're manifesting assent. It's like me saying you
4 agree to purchase something when you lift up your pen and
5 if you're not accustomed to purchasing things by lifting
6 up your pen, you might inadvertently purchase something.

7 THE COURT: So it's different from putting your
8 sticker in one part of the solicitation.

9 MR. MCINTURFF: Correct.

10 MR. PREVIN: But the telemarketing script is
11 going to be completely irrelevant to that analysis
12 because their theory is premised on the notion that all
13 of the disclosures that accompanied the check were
14 irrelevant because consumers weren't trained to read them
15 and just deposited the check thinking it was a refund.
16 So sort of -- I guess I don't understand what the
17 disclosure in a script would do for them. I mean, they
18 both disclosed one in writing, one verbally, what the
19 consumer is doing. Their theory is that the consumers
20 don't read the accompanying disclosures with the check.

21 THE COURT: So are you looking to find
22 liability with telemarketing schemes, as well as --

23 MR. MCINTURFF: No.

24 THE COURT: No, nit at all, right?

25 MR. MCINTURFF: No.

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1 MR. WITTELS: But the point is what Mr. Previn
2 said was what could be the relevance? Again, it's how
3 they present it. If they're presenting the script in
4 what they say to the consumers in a certain way, the
5 marketing expert -- and I'm not one -- I believe would
6 look at it and say oh, well, okay, they said three or
7 four things that are clear that the customer would
8 understand were signals to them, now you were now
9 enrolling in some versus --

10 THE COURT: It's a contrast basically.

11 MR. WITTELS: It's a contrast. I mean that's
12 why it's germane.

13 MR. ALEXANDER: So they want to say well, some
14 of your marketing is better than some of your other
15 marketing and so this other marketing is deceptive by
16 extinction.

17 MR. WITTELS: Well --

18 MR. ALEXANDER: That can't be the standard.

19 THE COURT: Or that they could do it. Are you
20 basically saying that if they want to, they could have
21 non-deceptive marketing but --

22 MR. MCINTURFF: Correct, and the context is
23 important here. The attorney generals from 48 states
24 achieve massive settlements on this type of marketing
25 starting from 2003 to 2008. Cross Country's customers

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1 over -- none of their other customer or none of their
2 other partners, other than a very limited number, engaged
3 in check solicitations post-2008. There was a -- these
4 attorney general actions and actions by the Federal Trade
5 Commission in the mid-2000s sent a message to the
6 industry that most participants got.

7 So the reason that Cross Country was engaging
8 in other marketing campaigns is because they had to.
9 There are e-mails -- we have e-mails where Cross Country,
10 the employees who were involved in the plan are talking
11 about the rough regulatory climate on check solicitations
12 because during this period, various states were outlawing
13 the device itself.

14 THE COURT: Uh-hum.

15 MR. MCINTURFF: It's illegal in Minnesota to
16 send someone a check that allows them to assent by
17 signing it.

18 THE COURT: So why do you need discovery on
19 this? Is this a dispute of fact?

20 MR. ALEXANDER: Judge --

21 THE COURT: I mean, it sounds as though --

22 MR. ALEXANDER: That's exactly the point, your
23 Honor.

24 THE COURT: Are you disputing these facts?

25 MR. ALEXANDER: They're facts. I mean, now you

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1 can --

2 THE COURT: So there --

3 MR. ALEXANDER: (Indiscernible) some of the
4 facts but I mean some of these facts are (indiscernible).

5 MR. MCINTURFF: So they're saying the
6 disclosures on -- so their argument is the disclosures on
7 the check are sufficiently prominent to where no
8 reasonable consumer could have been deceived.

9 THE COURT: Right.

10 MR. MCINTURFF: Your clients are --

11 THE COURT: Right. You're disagreeing about
12 the check but about the other mechanisms that you're
13 going to say are better and that could be used --

14 MR. MCINTURFF: Well --

15 THE COURT: -- are they going to disagree that
16 their telemarketing schemes were not deceptive? They
17 probably won't.

18 MR. WITTELS: No, but they're going to say that
19 the information was that -- Mr. Alexander said it. He's
20 going to say these people were dumb, they didn't read it.
21 So they're going to argue that there's no difference
22 between the check solicitation and the non-check
23 solicitation and we want to say yes, there is.

24 THE COURT: Okay . Stop right there. Are you
25 going to argue that?

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1 MR. ALEXANDER: It hadn't occurred to me to
2 argue it that way. I don't know why we would argue it
3 that way. The objective here is what does the check say?
4 What does the endorsement line say? What does the
5 material say? It says what it says. If they didn't read
6 it, that's one thing. If they were too stupid when they
7 read it, they didn't understand it, and they still --
8 that's another thing but I mean who read it and said oh,
9 this is a mortgage refund, that's the issue, the factual
10 issue. Who read that material and said oh, this is a
11 mortgage refund.

12 THE COURT: I mean, the cases I keep thinking
13 about are the ones that I have that involve soft drinks,
14 which I probably mentioned earlier, and everybody makes
15 similar arguments here and I am trying to figure out,
16 after especially having had discussions with marketers,
17 what you're really going to disagree about here and what
18 you really need discovery on and it may be -- is it
19 possible that you can stipulate as to some facts and
20 disagree about others and limit the amount of discovery
21 that's needed? That's the question I have and it may be
22 a naive one because I am not very deep in this area the
23 way you are.

24 MR. WITTELS: Oh, certainly, we can't. I mean
25 this is really our only dispute thus far in terms of what

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1 we can't agree on, in terms of what documents we're
2 requesting that are relevant.

3 THE COURT: Right, but what you want -- you
4 want to -- tell me if I am missing this. You want to
5 show that through telemarketing as opposed to sending
6 checks, there can be very non-deceptive, clearly --

7 MR. WITTELS: Disclosed.

8 THE COURT: -- illuminated, disclosable form of
9 marketing. I don't think they're going to disagree about
10 that, are they?

11 MR. WITTELS: No.

12 THE COURT: So what is it you need? You need
13 one template marketing script to show that it can be done
14 and it is done and then -- do you need every single
15 script? Would a stipulation work that they ran a non-
16 deceptive, fully disclosed marketing campaign? What do
17 you need to show a jury or a judge?

18 MR. MCINTURFF: Well, we would really need the
19 consumer responses to the campaign. So the response rate
20 of the campaign.

21 THE COURT: Okay. So that's in the data --

22 MR. MCINTURFF: Yeah, yeah.

23 THE COURT: -- which apparently is not too
24 burdensome.

25 MR. MCINTURFF: We would need the reasons for

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1 cancellation, which is also in the data. We would need
2 the amount of claims paid because again, the central
3 premise here is you don't utilize a service that you
4 don't know you're purchasing.

5 THE COURT: Uh-hum.

6 MR. MCINTURFF: And then some representative
7 sample of marketing material which if the check
8 solicitation is any guide, there's not that much
9 variation in the marketing materials. The defendants
10 essentially use the same template during the relevant
11 period.

12 THE COURT: Right. But you're not challenging
13 the marketing materials. You're using them as a
14 contrast, right?

15 MR. MCINTURFF: Right.

16 MR. PREVIN: But, your Honor --

17 MR. MCINTURFF: And that goes into -- if I just
18 real -- that goes into a number of additional factors
19 that our experts are going to consider in opining about,
20 for example, for purposes of class certification, whether
21 these representations are material. And then in terms of
22 purposes for motion for summary judgment, whether they're
23 likely to cause a consumer to manifest assent without
24 understanding it.

25 THE COURT: So would you be saying that if

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1 let's say a good market -- telemarketing script was
2 shown, that whatever is in that script is in effect,
3 material? Would you be using that script to show what's
4 material or would you be using to show that they could do
5 it when they wanted to?

6 MR. MCINTURFF: We would be using it to show
7 that --

8 THE COURT: Or something else?

9 MR. MCINTURFF: -- they could do it when they
10 wanted to and that if you look at the numbers of people
11 who canceled and made claims, that they were much more
12 likely -- consumers were much more likely to understand
13 what they were signing up for through the telemarketing
14 method rather than this particular solicitation.

15 THE COURT: So this was good. They could do it
16 and it didn't deceive consumers.

17 MR. MCINTURFF: Correct.

18 THE COURT: Or at least they didn't cancel.

19 MR. MCINTURFF: Correct.

20 THE COURT: Okay.

21 MR. MCINTURFF: Or as in as higher rates.

22 THE COURT: So how many marketing scripts do
23 you need? I mean --

24 MR. WITTELS: It's not only the scripts because
25 they have direct -- they have a lot of direct mail, as

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1 well.

2 MR. MCINTURFF: So these are templates. They -
3 - for the direct mail, they send templates to a mail
4 company who then inserts names and addresses. So the
5 direct mail, it's the templates. For the marketing
6 campaigns, we would want the scripts.

7 But we can meet and confer. If it turns out
8 there are a thousand scripts, then we'll back off but if
9 it turns out that there are five --

10 MR. PREVIN: Your Honor, I'm concerned that
11 this is being used to sort of -- as not solely for
12 putative control purposes but to grossly expand the scope
13 of the lawsuit. I mean Mr. Witells has even conceded --

14 THE COURT: Okay, well let me just stop you
15 there.

16 MR. PREVIN: -- not sure if it was facetious or
17 not, but he's not presently claiming that those other
18 materials were deceptive. If this is going to be a
19 vehicle then to bring a fourth amended complaint to get a
20 direct marketing and telemarketing, as well, then
21 obviously --

22 THE COURT: That's a different issue.

23 MR. PREVIN: -- then that's a completely
24 different issue.

25 MR. ALEXANDER: And that's what we're --

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1 THE COURT: I know that's what you're worried
2 about.

3 MR. ALEXANDER: -- open the door, clearly.

4 THE COURT: And that's what I am trying to
5 filter out.

6 MR. WITTELS: Look at, we brought a lawsuit on
7 those issues and that's not currently what we're planning
8 on doing, but that's not based on what -- it could be
9 based on the materials we had and that our customers
10 already knew about.

11 MR. PREVIN: But you obviously don't have the
12 direct mail materials yet and that's why you're asking
13 for them.

14 MR. WITTELS: Well, we have some I believe.

15 MR. PREVIN: Are you --

16 MR. WITTELS: That was produced I think --

17 MR. PREVIN: -- prepared to stipulate now that
18 you're not going to try to expand the lawsuit in this
19 way?

20 MR. WITTELS: I mean first of all, that's an
21 unconscionable stipulation to ask a plaintiff as an
22 attorney.

23 MR. PREVIN: Well, but then --

24 MR. WITTELS: I mean as (indiscernible) law --
25 (Cross-talk)

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1 MR. MCINTURFF: (Indiscernible).

2 THE COURT: I can tell you something though,
3 that I would only order the disclosure of that on
4 condition that if there were a motion to amend the
5 complaint, I would not look as favorably on that motion
6 -- the leave to amend would not be as freely granted if
7 it appeared that a previous discovery ruling was used as
8 a vehicle -- a fishing expedition to try to expand the
9 complaint. And we're on the record and I can say that.

10 MR. PREVIN: Thank you, your Honor.

11 THE COURT: Because I mean I understand that
12 that's a concern you have and I'm really trying to filter
13 out what each side's interests are here to see if there's
14 a way that we can do what's necessary. I don't want to
15 preclude either side from making an argument on the
16 merits in the end or from -- and I don't want to shut off
17 discovery that would in effect, prejudge an issue on the
18 case. That's what I don't want to do.

19 I also want to decrease the burdens on you and
20 make sure that this isn't being used as -- you know, sort
21 of trawling for new plaintiffs.

22 So if we can -- my summary, at least in my mind
23 at this point, is that the downloads are relatively
24 simple. The marketing material, we don't know yet but
25 there's a concern that it might be a little bit more

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1 burdensome. Counsel are willing to meet and confer about
2 that and if it is burdensome, I will -- and you can agree
3 that's fine. If you can't agree, then I'll make a cut
4 and we'll do something like a template or a small number
5 of marketing materials that wouldn't be burdensome
6 because this is not -- that's not the purpose of this
7 discovery. Will that work for you?

8 MR. ALEXANDER: Whatever you say, your Honor,
9 is --

10 THE COURT: Okay.

11 MR. ALEXANDER: -- we're going to make work.

12 THE COURT: Okay. But --

13 MR. ALEXANDER: That doesn't necessarily mean
14 I'm happy about it.

15 THE COURT: Well, I'm not asking you to say yes
16 that's my -- the ruling I would like.

17 MR. ALEXANDER: Yes, right.

18 THE COURT: But I do think that this is --

19 MR. ALEXANDER: We will in good faith comply
20 with that, whatever your Honor feels is fair.

21 THE COURT: Okay. All right. So obviously
22 this means I do believe that what plaintiffs are looking
23 for is reasonably calculated to lead to the discovery of
24 admissible evidence as we've just discussed now and I
25 want to keep the burden on the defendants to minimize

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1 that with respect, especially to the marketing materials.
2 If it turns out that the download of consumer response
3 rates, rate of cancellation and amount of claims being
4 paid is more complicated or more burdensome than you
5 thought, you know, you obviously have leave to come back
6 but it sounds as though that's not going to be a problem.
7 And then again, with respect to expanding the scope of
8 the lawsuit, I've already told you how I feel.

9 MR. ALEXANDER: Very well.

10 THE COURT: Okay. What else? Anything else?

11 MR. WITTELS: Yes, your Honor. Point two was
12 depositions and this should be thought of perhaps in
13 light of the discovery cutoff which we believe we cannot
14 make for various reasons.

15 THE COURT: Okay. Not a problem. Do both
16 sides agree that we need to extend or is there is a
17 dispute about that?

18 MR. PREVIN: There is a dispute about that.

19 THE COURT: Okay. So?

20 MR. WITTELS: So the first point is that until
21 last week there were not discovery -- I think until last
22 week, there was no discovery sent to the plaintiffs
23 whatsoever by the defendants in terms of interrogatories
24 and we started last week getting scattered notices to
25 admit and interrogatories to some of the named

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1 plaintiffs.

2 THE COURT: Okay.

3 MR. WITTELS: And I got an e-mail, I think it
4 was from (indiscernible) to depose the named plaintiffs.
5 As we said there are 30 named plaintiffs from the various
6 18 states. When we move for class cert, we intend to
7 move only at this point, for the RICO certifications --

8 THE COURT: Uh-hum.

9 MR. WITTELS: -- which has been sustained and
10 for California and New York --

11 THE COURT: Right.

12 MR. WITTELS: -- which importantly, have a very
13 large number of potential class members.

14 THE COURT: Okay.

15 MR. WITTELS: They're the largest in two
16 states, I think, maybe Texas --

17 MR. MCINTURFF: Three -- the largest
18 (indiscernible).

19 THE COURT: And the laws are reasonably
20 similar?

21 MR. WITTELS: Yes.

22 THE COURT: I remember the case law is slightly
23 different in California from New York but I can't
24 remember exactly.

25 MR. WITTELS: Right, a little bit

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1 (indiscernible). So we're going to move under those.

2 We've said to the -- we had a long discussion
3 yesterday with the counsel on the record, and we said we
4 will produce the four, although we said you'll probably
5 you get what you need from -- I think Ms. Delgado was
6 more lead than her husband, Mr. Sheppard but we said if
7 you need them, we'll give you both and the two California
8 plaintiffs.

9 We thought that it would be prudent to do those
10 four first, then regroup and assess whether, in fact,
11 they want to do the rest or whether there was an
12 alternative method that the Court, which has its power --
13 inherent power under Rule 23 to direct the management of
14 the class, might say well, look, why don't you ask the
15 rest on deposition questions. You have the large class
16 action that's sometimes done, and approved by the Court
17 as an alternative method to avoid burden because the
18 plaintiffs are scattered all over the country.

19 And we thought that might be a good way to at
20 least come back and talk to your Honor about it or talk
21 to the defendants first obviously to see whether they
22 wanted to continue on that.

23 THE COURT: Have you thought about phone
24 depositions?

25 MR. WITTELS: Yes, we proposed it and we --

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1 THE COURT: Okay.

2 MR. WITTELS: -- defense counsel who is not
3 here says he doesn't like it but I mean, I've done phone,
4 I've done video. I mean it's -- I think other than
5 President Obama who was on the video looking at -- I
6 mean, well, a lot of things are done --

7 THE COURT: Yes, but look at how the world is.

8 MR. WITTELS: -- about electronic. But I was
9 also going to say to your Honor, the defendants have
10 pending motions to dismiss entirely, a number of these
11 states. So does it really make sense to do all of the
12 other plaintiffs at this point when if we get certified
13 in a RICO, yes, we're not saying that they wouldn't
14 necessarily get to question them but the defendants do
15 know quite clearly what the claims are and why do I say
16 that, because they (indiscernible).

17 I'm not trying to foreclose, just as I wouldn't
18 ask that they foreclose our question but I'm saying let's
19 try to do it in a reasoned fashion. Do the four and then
20 let's regroup and see if they want to go forward on the
21 rest or how to go forward.

22 THE COURT: The motions to dismiss, can you
23 tell me about them a little bit? Are they -- which
24 states do they involve and are they on only state law
25 claims?

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1 MR. PREVIN: Yeah, they're state law claims. I
2 think all of the new state law claims. I'm can't
3 remember if it's 16 or 18. Judge Garaufis in the first
4 motion to dismiss --

5 THE COURT: Garaufis.

6 MR. PREVIN: I'm sorry, Garaufis, dismissed
7 some portions of the New York State claims and portions
8 of the California State claims. We'd move to dismiss the
9 new state claims based on what we think are similar
10 theories and additional theories.

11 Your Honor, the way we look at this, discovery
12 is not unilateral. The obligations of discovery are
13 bilateral. The plaintiffs are the ones who decided to
14 name 30-named plaintiffs.

15 THE COURT: Uh-hum.

16 MR. PREVIN: We have a right to depose in
17 person each of those named plaintiffs if we want to.
18 Maybe we'll do some by phone, that's -- you know, we can
19 talk about that further but we shouldn't be required to
20 do that. Each of those named plaintiffs represents a
21 different putative state law claim and it's absurd to say
22 that we don't get to depose them at this point. This
23 sort of how we view those named plaintiffs will impact
24 case strategy for the defendants and I see no
25 justification for delaying our right to propound

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1 discovery on them and depose them, unless we want to just
2 say okay, well let's just stay all discovery and until
3 our motions are resolved, you know, then we can talk
4 about that. Then that's sort of mutually beneficial.

5 But we shouldn't be put through the ringer
6 including, I might add, plaintiffs have included in their
7 proposed search terms, the names of those very same
8 plaintiffs who they say we shouldn't be deposing now.

9 So they want us to produce information about
10 them. They don't want to offer them up for our own
11 discovery. I mean, that's just blatantly unfair.

12 THE COURT: Have you talked about proceeding
13 with discovery just for the California, New York and RICO
14 claims and holding the other states? It sounds though
15 that's a little bit of the staging that you're talking
16 about now, as well.

17 MR. WITTELS: We wouldn't move on those state
18 claims until the motions are resolved. It took Judge
19 Garaufis, you know, a while. If we get an extension
20 here, briefing probably wouldn't be submitted till -- I'm
21 saying September.

22 THE COURT: Right.

23 MR. WITTELS: Right now it would be -- it
24 wouldn't be August, but we're asking for September,
25 possibly end of September. It took Judge Garaufis about

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1 eight months --

2 MR. MCINTURFF: Nine -- eight --

3 MR. WITTELS: -- eight, nine months.

4 THE COURT: He's got a lot of cases.

5 MR. WITTELS: He's very busy and it's going to
6 be complicated because they've made --

7 MR. PREVIN: Your Honor, we shouldn't have to
8 defend serial class certification briefs. The deadline
9 in the existing CMO is February for the class
10 certification briefing. The additional motion is -- I
11 mean, I don't see any reason why that can't be met. We
12 take the plaintiff's deposition.

13 These are not going to be full-day depositions.
14 We're talking, you know, I don't know, maybe three hours
15 per plaintiff.

16 THE COURT: Right. But you want to take the --
17 even though you think you might have some of the state
18 law claims knocked out, you would want to take their
19 depositions --

20 MR. PREVIN: Yes.

21 THE COURT: -- on the state law claims still?

22 MR. PREVIN: Yes, yes.

23 THE COURT: Okay.

24 MR. PREVIN: I mean, we don't want to wait
25 until that motion is decided to find out -- to assess the

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1 viability of the named plaintiff's claims. We want to
2 proceed -- unless we just stay discovery and say okay,
3 let's wait and see what the operative complaint is going
4 to be and then we'll proceed with discovery.

5 But as long as we're producing information, we
6 want to be able to assess and test the claims. I haven't
7 heard, for example, the recordings of the plaintiffs. I
8 represent Ocwen. These are Cross Country recordings. I
9 want to be able to assess the veracity of the named
10 plaintiffs.

11 THE COURT: Right.

12 MR. PREVIN: And there's still purporting to
13 represent RICO claims and serve as putative named class
14 representatives on a theory that apparently plaintiffs
15 are still proceeding with. So we're entitled to depose
16 them.

17 THE COURT: Remind me what the classes are that
18 are to be certified. There's a RICO class, I assume.

19 MR. PREVIN: Nothing's been certified.

20 THE COURT: No, I mean that would be certified.

21 MR. PREVIN: Well --

22 MR. ALEXANDER: They're seeking to certify a
23 RICO class nationwide --

24 THE COURT: Right.

25 MR. ALEXANDER: -- and 18 separate consumer

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1 fraud state law claims.

2 MR. PREVIN: And I've never heard of doing sort
3 of two different full rounds of class certification
4 briefing in a staged way. That's extraordinarily
5 cumbersome.

6 MR. ALEXANDER: Well, anything -- no, anything
7 can be done, with all due respect.

8 THE COURT: Yes.

9 MR. PREVIN: Yes.

10 MR. ALEXANDER: Anything can be done but that's
11 not the way it was set up in this. And when we were
12 looking at this case management order, they knew they
13 were adding at least 15 other states, if not 16 other
14 states in the fall.

15 THE COURT: Right.

16 MR. ALEXANDER: Now there is another factor
17 here but I want to get clarification.

18 THE COURT: Uh-hum.

19 MR. ALEXANDER: And it cuts sort of both ways.
20 We have a motion to compel arbitration against most of
21 these additional 16 plaintiffs.

22 THE COURT: Right.

23 MR. ALEXANDER: And we sure don't want to run
24 afoul of the discovery deadline that we have, that we
25 thought we could meet -- we thought we could meet and

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1 have the argument well, you've waived discovery because
2 -- you've waived your arbitration because you're getting
3 discovery from the plaintiffs.

4 I mean, we brought this issue up to Judge
5 Garaufis in February, so this is no surprise to the
6 plaintiffs, despite what they said in their letter. This
7 has been on the table that we would be moving for
8 arbitration in connection with our motion to dismiss
9 since February.

10 THE COURT: Right.

11 MR. ALEXANDER: And it's our understanding,
12 maybe improper, but our understanding that Judge Garaufis
13 wanted the case to move along. It already addressed some
14 of the motions to dismiss and these were going to be
15 other state law claims. But we have this discovery
16 deadline and so we felt that we were proceeding within
17 the meaning and the spirit of the case management order
18 by asking for discovery even though we have a motion to
19 compel arbitration. We don't want to take an unfair
20 advantage but we're also bound by the case management
21 order.

22 So as my co-counsel has said here for Ocwen,
23 fair is fair. This case management order does not have a
24 staged class certification process. It doesn't have a
25 staged discovery process and if they feel that discovery

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1 of their clients for the claims that they voluntarily
2 brought should be stayed, then fair is fair.

3 But by the same token, this case has been
4 pending for a while and we feel that if the Court wants
5 us to do discovery without prejudice to our motion for
6 arbitration, we're prepared to go forward and in good
7 faith meet those burdens and what we discussed with the
8 plaintiffs is look, you have a lot of moving parts to
9 what you want. Why don't you get some ESI? I mean we
10 have spent -- and I have to say it -- we predicted this.
11 It would be a long time going back and forth to try to
12 negotiate all these custodians and search terms, whether
13 -- if we had just been doing what we were supposed to do
14 and producing the data, they would have that and then we
15 would be talking about the second round but we haven't
16 got any ESI yet. We're close and I think that the
17 process has ultimately worked so that we are at least in
18 agreement tentatively at this point, for custodians, very
19 close to search terms and we hope to be producing ESI
20 starting, you know, in another few weeks after we get the
21 final bells whistles attached to this.

22 So I put a lot on the table for the Court's
23 consideration here but --

24 THE COURT: But, you know, the one thing that I
25 keep thinking and I know you're all going to say how

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1 could he be thinking this but it sounds -- I'm just
2 trying to imagine 18 classes, state classes certified and
3 how they're going to be decided. I mean I had an MDL
4 case where we had five -- maybe eight states and we
5 decided that it just didn't make sense to have a court
6 that's not sitting in that jurisdiction, that's not
7 familiar with the law let's say of Ohio or the Virgin
8 Island or Montana or whatever else, to make a decision as
9 to what a particular class for that state is entitled to
10 and what the state law is.

11 Often, you know, there's -- well, I know in
12 California, there are even splits on certain issues
13 between the state and federal court, I believe, but in
14 other states, the law is evolving and I'm just wondering
15 how you ultimately see this case, I mean, on all sides,
16 just from a sanity point of view. How you're going to be
17 resolving cases where you have the laws of 18 different
18 states and classes for 18 different states. You're going
19 to have separate jury trials for each one? Are you going
20 to have like a 90-page verdict sheet for the jury for
21 different state law questions or is it less complicated
22 than I am thinking?

23 And I think the big picture might be helpful to
24 me in figuring out how to manage this case because I'm --
25 every time I think about the issues you're talking about

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1 now, I run up against that bigger issues of my God, if I
2 were plaintiff's counsel or even defendant's counsel, how
3 would I be managing 18 separate classes, different law?

4 MR. WITTELS: What you've raised is exactly why
5 a management of a class action is not set in stone from
6 the first initial November case management plan. Things
7 have happened and transpired which have changed the ball
8 game and although defendants are saying you knew what was
9 going to happen, we didn't know what was going to happen
10 because we didn't know the defendants were going to move
11 to compel arbitration on grounds that we think is
12 frivolous, frankly utterly frivolous because no one
13 signed anything. No one has sent it to those arbitration
14 clauses --

15 THE COURT: Okay. I'll assume you win just for
16 purposes of your argument.

17 MR. WITTELS: Okay. But that's one element.
18 We didn't know that was going to happen. We also when we
19 were in front of you, contemplated going back and forth
20 with defendants to see what claims they would actually
21 agree to or not agree to in the amended complaint.

22 THE COURT: Uh-hum.

23 MR. WITTELS: We didn't know we were going to
24 be briefing so many states. We thought we could maybe
25 reach some agreement because the law is pretty similar.

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1 We've already won on New York and California state fraud
2 claims, yet they want to do a nuanced -- you know,
3 somehow distinguish the judge's decision on the other
4 states.

5 But your Honor has hit it on the head which is
6 why class actions and Mr. Alexander recognized it, are
7 fluid in terms of management and approach. You can
8 certify some classes. You can do things in stages, which
9 is exactly what we're proposing here which is that we're
10 not saying you're not going to get all 30. We're not
11 saying that because if you do, you do a wage an hour
12 case, and we -- I'm sure both sides have done that, you
13 often end up doing 50, 60 plaintiffs but some sub amount
14 of the representative class.

15 Here, 20 is not a -- or 30 is not an exorbitant
16 number. It's a lot of depositions but we're saying for
17 purposes of this case, we're going to move first on RICO
18 because if we get RICO, maybe we don't need to move for
19 class certification or hold that in abeyance under the
20 Court's management authority. We'll hold that in
21 abeyance, not necessarily that we wouldn't move on it but
22 we would have RICO, which covers all the class members
23 and we'd have two representative states of consumer fraud
24 that a jury could more easily get its arms around.

25 So we thought put up the four. They could hit

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1 -- they could serve, after we do the four, if they really
2 think we need to ask each individual questions, follow-up
3 with written questions. Ask us interrogatory questions
4 or ask us written questions on depositions which are
5 provided for in the rules. You don't like that, if
6 that's not good enough for you after that, okay, then you
7 can depose them.

8 Or we come back and we discuss after you do
9 the four, do you really want it? Mr. Previn says he
10 hasn't heard the tapes. Well, he'll listen to the tapes.
11 I mean, he's got a sharing agreement with Cross Country.
12 He can get the tapes pretty easily. They were, you know,
13 giving -- they were getting paid by Cross Country to do
14 this deal. So we can easily get the tapes.

15 And he has his own tapes where our customers
16 call -- I don't know if they actually tape them but our
17 customers certainly called his customer service to
18 complain and they were shunted to Cross Country.

19 So we're asking for a reasonable process that
20 obviously in a class action, which is of a substantial
21 size here. They collected over 20 -- close to \$24
22 million --

23 MR. MCINTURFF: Close to 24.

24 MR. WITTELS: -- close to \$24 million dollars
25 in -- from this check solicitation scheme. If it's

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1 trebled by RICO, that's very large numbers.

2 So we're suggesting that we do it in stages and
3 to do a class action, yeah, we think it was very
4 ambitious. I mean we signed off on the date of August.
5 We've all been working towards that. It's taken longer
6 than we've wanted on the ESI. We think our procedure in
7 going back and forth is going to save time in the end
8 rather than them producing and us having to go back.
9 That's why we did it. We had an ESI consultant expert
10 who told us don't agree to them doing it that way because
11 that's what defendants want to do. When we saw their
12 first word list, we knew why we didn't because it didn't
13 have the words we thought should be on it for the ESI.

14 So look, we're working cooperatively. We have
15 one dispute here. Now we have a dispute about extending
16 the time. I understand defendants want to end the case
17 quickly. It's a large class action. It can't end that
18 quickly. Class motions, you probably know in your cases,
19 three or four years later sometimes people are moving.
20 Okay? We're not looking for that long. We hope to get a
21 class motion on much sooner than that.

22 But certainly this discovery is taking time and
23 the August date, we think has to be moved and we would
24 like your Honor to order us to produce or we'd stipulate
25 to produce the first four and come back and then work out

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1 whether we have to be ordered or whether we'll
2 voluntarily come up with a good method for those other
3 depositions.

4 THE COURT: What do you lose by doing that? In
5 other words, if I told you that I would generally like to
6 stage discovery and when there's a dispute like this, it
7 makes sense to just take the four that you agree on first
8 and then come back and talk about the rest and that I'm
9 inclined to let you go ahead with all the discovery you
10 want but I would want to hear, you know, whether you
11 agree on a different method. Would that be a problem for
12 you?

13 MR. PREVIN: It would, your Honor. I think
14 it's prejudicial to us to force us to go through two
15 rounds of class certification briefing which is a very
16 cumbersome and expensive process with experts.

17 THE COURT: Okay. Stop. Why would the
18 deposition schedule mean that you have to have two rounds
19 of --

20 MR. PREVIN: Because I think what Mr. Witells
21 is proposing is that we depose four -- only four of the
22 30 plaintiffs. He will then move for class certification
23 on the RICO claim and then after that, we get to depose
24 the other plaintiffs and then he will move to certify the
25 state law claims.

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1 THE COURT: Is that what you're requesting?

2 MR. WITTELS: Well, I don't -- I don't --
3 that's our plan. But as I said, we're not going to move
4 with pending motions to dismiss, I mean we could
5 conceptually and procedurally, we have the right to file
6 a class motion on whatever want but the whole point of
7 the class certification device is to allow you to do it
8 in a manageable way and subclassing is envisioned.

9 And fluid management of classes, the Court
10 itself can change the definition of the class. Our first
11 definition is going to be a RICO class and New York and
12 California. So we are going to move on those. Whether
13 we even had -- I mean, we can move now. We may move soon
14 on those but we can't be precluded. I mean, I've never
15 heard of a court saying well, you've got to move on
16 everything. It wouldn't make sense for me to move on
17 everything anyway when they've gotten pending motions to
18 dismiss and arbitrator. It wouldn't even feasibly make
19 sense. It would just be a waste of judicial effort
20 unless the Court wants to decide it at the same time, you
21 know. Look at the 15 states they want to dismiss and
22 then say denied but grant class cert and that could be
23 done but we're not doing it that way. We think that's a
24 burden to the Court.

25 THE COURT: Uh-hum.

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1 MR. WITTELS: So we are asking. They're not
2 prejudiced. There's no prejudice here at all. We
3 already have a RICO claim sustained by Judge Garaufis.
4 What's the prejudice? How are they prejudiced?

5 THE COURT: I don't see that I am going to
6 decide here today whether or not you can move for class
7 certification in two stages. That's not the issue really
8 before me. The issue is discovery. I know it's what
9 you're thinking of but I think Judge Garaufis may want to
10 weigh in on that, too. I'm just trying to image what
11 summary judgment -- well, even forget summary judgment,
12 just even the class certification motion is going to look
13 like when you have 18 states and a RICO. It's going to
14 be a pretty huge, complicated motion.

15 MR. PREVIN: We think it will be unmanageable
16 but that's their -- I mean, obviously that's their
17 complaint and they're entitled to try to move under that
18 theory.

19 THE COURT: Right.

20 MR. PREVIN: We think there will be significant
21 variances in the state law that will preclude those kinds
22 of classes. But the --

23 THE COURT: Well, but there may be a California
24 class and maybe a New York class and an Ohio class.

25 MR. PREVIN: There may be and that's presumably

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1 what they're going to seek to certify.

2 THE COURT: And there may be a few states that
3 are similar but who knows?

4 MR. PREVIN: Yeah, maybe.

5 THE COURT: Who knows?

6 MR. PREVIN: Obviously, it's our preference to
7 deal with that all in one class certification but --

8 THE COURT: Right, but --

9 MR. PREVIN: -- I understand that that's not
10 the issue for today.

11 THE COURT: And I think Judge Garaufis is the
12 one that has to really weigh in on that because it's
13 going to be his motion unless he refers it.

14 MR. PREVIN: Understood, your Honor, but
15 regardless, each of the named plaintiffs proposes to be a
16 class representative on the --

17 THE COURT: On the RICO claim.

18 MR. PREVIN: -- at the very least, the RICO
19 claim.

20 THE COURT: Right.

21 MR. PREVIN: We are entitled to depose --

22 THE COURT: Yeah, I agree with you on that.

23 MR. PREVIN: They have signed up to be --

24 THE COURT: I agree with you. I agree with you
25 on that. So I don't see that the class -- for me, I

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1 haven't seen this as the timing of the class
2 certification motions, as much as the timing of the
3 discovery and should you take the depositions of the
4 state class representatives -- putative class
5 representatives before you know what the state law claims
6 are going to be and that's the question.

7 So my inclination would be to have you -- I
8 don't know how long it's going to take to do the
9 discovery you have now and take four depositions but just
10 have you come back when those are done and with the idea
11 that you continue with the other depositions unless there
12 seems to be a good reason not to.

13 MR. PREVIN: I mean, your Honor, we can take
14 the first four first and proceed in that kind of a serial
15 fashion but I really do object to the notion that we
16 wouldn't be allowed to proceed with the others if we
17 wanted to. I mean, that's sort of the -- there's --
18 those are relevant considerations in how we want to
19 defend the case. So assessing whether they are adequate
20 class representatives and they purport to be that, even
21 just on the RICO claim, unless the plaintiffs want to --
22 those other 26 plaintiffs want to withdraw their RICO
23 claims and only have the four pursue RICO claims.

24 But as long as they're going to be pursuing
25 RICO claims --

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1 THE COURT: Right. No, I agree with you on
2 that. I don't disagree on that. I think you are
3 entitled to take the deposition of anyone who is going to
4 be a class representative on any claim and the question
5 is how do you stage it and if the pending motions are not
6 going to have an affect on the RICO claim, then there's
7 no reason you can't do that.

8 The question for me though is it efficient to
9 try to see whether or not you can come up with a better
10 mechanism for deposing all these plaintiffs but it seems
11 to me that the burden is more on the defendants than on
12 the plaintiff in taking that number of depositions. The
13 plaintiffs chose to be plaintiffs in the case. They have
14 to make themselves available for depositions. If it's a
15 great burden on defendants to depose all of them, and
16 it's better for defendants to have telephone depositions
17 or video depositions or something else, then I would
18 think you would be more entitled to that. I don't see
19 holding up the discovery other than to see whether
20 there's a more efficient way to handle all the
21 depositions.

22 MR. PREVIN: And we will talk about that with
23 our clients and then with plaintiffs if -- you know,
24 there may be some that we decide we want to do
25 telephonically. You know, it's premature to -- I'm not

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1 in a position to say one way or the other but we ought to
2 have the right to do it the way we want to do it and if
3 it's more -- if we decide we can some of the depositions
4 by phone or by video, then we'll make that decision and
5 confer with plaintiffs. If we decide we want to do them
6 in person or some or all of them in person, then we'll do
7 that. But I don't think we need to make that decision
8 now, we'll --

9 THE COURT: Right, I mean they're your
10 depositions because of the plaintiff and the expense of
11 going to the different states is largely yours because
12 the plaintiffs chose to bring their case here in New
13 York.

14 So I think on most of the factors, the burden-
15 benefit or whatever cost issues would be, they would
16 probably be on your side.

17 MR. PREVIN: Well, I think we're allowed to
18 make them come to New York. Now we may decide to go
19 elsewhere in the spirit of cooperation and try to get the
20 depositions done as quickly as possible. We'll talk to
21 plaintiffs about that and see if there are some ways we
22 can make this. I mean it's in all of our interest for
23 this to be done as efficiently as possible.

24 MR. ALEXANDER: We may be able to just have
25 different sites. In other words, have three or four

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1 plaintiffs --

2 THE COURT: Regional office.

3 MR. ALEXANDER: Yeah, regional sort of hubs or
4 something.

5 THE COURT: Okay. No, I don't disagree with
6 you on that but as to the timing of the motions, I think
7 that's something that you're going to have to talk to
8 Judge Garaufis about.

9 MR. WITTELS: All right. Well again, I'm not
10 sure if your Honor's ruled. You've kind of indicated.
11 Our proposal would be to do the four. We've offered to
12 do those. And then --

13 THE COURT: Meet and confer.

14 MR. WITTELS: -- discuss -- meet and confer and
15 see if we can agree on a plan for how to do the others,
16 whether --

17 THE COURT: Right.

18 MR. WITTELS: -- again it's on questions on
19 paper or --

20 THE COURT: Right.

21 MR. WITTELS: -- by interrogatory or by video
22 or whether they want to go forward. Let's just take it
23 one thing at a time.

24 THE COURT: Right, but I can tell you that my
25 inclination is that the defendants have a right to decide

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1 how to do it because the plaintiffs chose to bring the
2 case and as long as -- any plaintiff who is going to be a
3 class -- a putative class representative for a RICO claim
4 under any briefing theory would be discoverable, so --

5 MR. WITTELS: If I may, can I confer with
6 counsel?

7 (Counsel confer)

8 MR. WITTELS: Yeah, well they are on the
9 complaint as named plaintiffs.

10 THE COURT: Uh-hum.

11 MR. WITTELS: We haven't moved for their
12 certification as class representatives on RICO on
13 everyone. I can tell you that it is likely and that's
14 why we've offered the four, that they will be. If we do
15 decide as Mr. Previn said, if the plaintiff's decide they
16 don't want to have certain class members as class
17 representative for RICO --

18 THE COURT: Uh-hum.

19 MR. WITTELS: -- then we can discuss that.

20 THE COURT: Right.

21 MR. WITTELS: Then we wouldn't have to produce
22 them until perhaps the state claims were decided and we
23 knew whether to proceed.

24 THE COURT: Right. And then you may -- again,
25 I'm not sure what the best way to manage this case is

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1 going to be but there might be some thought that you
2 might want to proceed with one -- you might want to
3 bifurcate the discovery or the claims or you might now.
4 I mean, do you really want to go through the briefing of
5 all the state law claims? Is this case settleable if you
6 have a decision on the RICO claims? I don't really know
7 how you're all thinking about that but I am guessing that
8 since the RICO is a bigger stake damages type of claim,
9 once you have a result on that, or once you have the
10 discovery done, you may be more inclined to talk
11 settlement without the time and expense of 18 different
12 state law claims being litigated.

13 MR. WITTELS: Which is why, your Honor, we're
14 offering the first four named plaintiffs and to move
15 forward in that fashion and to move forward on --

16 THE COURT: No, I understand.

17 MR. WITTELS: -- RICO, New York and California
18 because if that gets certified, that is an ideal time to
19 come to the table.

20 THE COURT: Uh-hum.

21 MR. WITTELS: And certainly the thinking going
22 into the certification of the RICO and the New York and
23 the California claims would affect any subsequent motion.
24 Neither party would be able to abandon whatever
25 certification motion was initially -- order was initially

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1 entered.

2 MR. PREVIN: Your Honor, it sounds like the
3 plaintiffs are pretty committed to this sort of staged
4 process.

5 THE COURT: Uh-hum.

6 MR. PREVIN: And so maybe we need to tee that
7 up --

8 THE COURT: Right.

9 MR. PREVIN: -- because I think if we do it
10 that way, this case is going to last forever because I
11 mean we plan to move for summary judgment on the RICO
12 claim. We're pretty optimistic about that. Obviously,
13 we don't need to talk about that now but that motion
14 isn't going to get decided, you know, till some time next
15 year and so, you know, if we're going to go through all
16 of this on RICO and then all of this on state law claims,
17 this case is going to last years.

18 I think it's our preference to do it --
19 everything all at once --

20 THE COURT: Uh-hum.

21 MR. PREVIN: -- because I think it's more
22 efficient that way. There's a lot of overlapping
23 evidence So I'm opposed to the idea of doing it. I'd
24 like to give it more thought. You know, this is -- you
25 know, we haven't heard this until recently. But it

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1 sounds like that's an issue that probably needs to --
2 that we ought to -- need to address before Judge Garaufis
3 if that's the way the plaintiffs are planning to proceed.

4 THE COURT: I think so ultimately. I mean, we
5 can talk about it here. If you all agree on a strategy,
6 or if you all want to think about it a little bit more, I
7 think you all have a common interest in trying to figure
8 out the most efficient way to litigate this case because
9 it could be a monster at some point. And the question
10 is, you know, how to do it. And I think if everybody
11 just steps back a little bit and tries to figure out
12 what's best, that might be an approach to take.

13 MR. PREVIN: I think that's well said, your
14 Honor. I mean, I guess the only -- I don't -- it seems
15 to me that while these issues are being decided,
16 notwithstanding that there were going to be some open
17 issues, I still feel pretty strongly that we want to take
18 -- we want to have the right to take all of the named
19 plaintiff's depositions, unless they want to withdraw
20 from the case without prejudice, then as long as they're
21 at --

22 THE COURT: Well, I've already made a ruling
23 that if they're going to be the class representatives for
24 certain --

25 MR. PREVIN: The problem is we don't know -- I

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1 mean, they've indicated that they may or may not include
2 them in their class certification.

3 THE COURT: Unless they don't. Unless they
4 affirmatively tell you that they're going to be withdrawn
5 as potential class representatives, you're entitled to
6 take depositions.

7 MR. PREVIN: Well, when will we know that? I
8 mean, they don't file --

9 THE COURT: When you notice their depositions.

10 MR. PREVIN: Oh, and so at that point, they
11 will then tell us whether or not they consent --

12 THE COURT: Yeah, I think they would have to.

13 MR. PREVIN: Okay.

14 THE COURT: Because that would be the only
15 reason to decline to take a deposition.

16 MR. PREVIN: Okay.

17 THE COURT: But I think after -- I think
18 plaintiff's point is well-taken, that after the first
19 four, New York and California plaintiffs have been
20 deposed, you should meet and confer and try to figure out
21 if there's a more efficient way to resolve the discovery
22 issues.

23 And if you don't think there is and there's no
24 real legal issue to present to me, then I think you would
25 start noticing the other depositions and unless the

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1 plaintiffs withdraw a particular putative class
2 representative or plaintiff from being a putative class
3 representative, then you would be entitled to take the
4 depositions.

5 MR. PREVIN: Okay. Thank you, your Honor.

6 THE COURT: Okay. Is that clear?

7 MR. PREVIN: Yes, your Honor.

8 THE COURT: Okay.

9 MR. MCINTURFF: The final issue -- we're now
10 almost at the dinner hour.

11 THE COURT: Yes.

12 MR. MCINTURFF: -- is whether your Honor would
13 entertain our request because it is apparently opposed,
14 unless we changed their mind, on an extension of the
15 discovery schedule and we know it's not the end of August
16 yet but we contemplate that we won't have what we need in
17 terms of depositions, discovery, et cetera.

18 THE COURT: You mean you won't finish 30
19 depositions by the end of August?

20 MR. MCINTURFF: Correct.

21 THE COURT: I don't think you will either.

22 MR. PREVIN: It's not clear to me that we're
23 getting 30 depositions, your Honor.

24 MR. ALEXANDER: Yeah, we may not --

25 MR. PREVIN: I mean, they can't have it both

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1 ways.

2 MR. ALEXANDER: We may only have four.

3 MR. MCINTURFF: Well --

4 MR. ALEXANDER: You ought to get four done by
5 August.

6 MR. MCINTURFF: Well, I'm -- obviously there's
7 just not -- you know the Court was not setting only 30
8 depositions. There's our depositions. There's ESI.
9 There are further interrogatories.

10 THE COURT: Yes.

11 MR. MCINTURFF: There's a lot of material that
12 has to be (indiscernible).

13 THE COURT: So I think it's important to keep
14 the case moving but I think August 31st is not a
15 realistic time. So we can extend it and then we'll have
16 another conference and see how everything is going. So
17 do you want to agree on an extension time or shall I just
18 make an arbitrary date?

19 MR. ALEXANDER: Since we can't agree --

20 MR. MCINTURFF: We should probably confer. I
21 think like -- now that we've got this issue settled, I
22 think we probably could agree on it.

23 THE COURT: Think about your vacation
24 schedules. Think about your families. Think about your
25 clients. Think about the case and what has to be done

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1 and work out something that works fine for you. If not,
2 I'll just set an arbitrary date and without really
3 knowing what's good for all of you.

4 MR. MCINTURFF: Do you want to at least attempt
5 to agree and --

6 MR. ALEXANDER: Well, we had an offer from you
7 yesterday which, you know --

8 MR. MCINTURFF: Well, I said I thought --

9 MR. ALEXANDER: -- that (indiscernible).

10 MR. MCINTURFF: -- nine months was a good
11 control date to see what we accomplish. I mean, I --

12 MR. ALEXANDER: Nine months seems a little
13 long.

14 THE COURT: So come back with another number.
15 What do you think?

16 MR. PREVIN: I mean, I think we should do this
17 in stages to keep the pressure on. I think we should
18 have, I don't know, maybe a sixty day extension.
19 Obviously, we can come back if it looks like that's not
20 going to work.

21 THE COURT: Right.

22 MR. PREVIN: Your Honor seems to be pretty
23 flexible about these things.

24 THE COURT: Uh-hum.

25 MR. PREVIN: But there's -- to sort of to push

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1 all of this to next spring and have -- I mean, my concern
2 about this case is that the way plaintiffs are
3 approaching it -- and I'm not saying this in an
4 accusatory way, it's just the way it's happening, sort of
5 is making this very expensive to defend. We're going
6 through all of this sort of back and forth on ESI.

7 THE COURT: Uh-hum.

8 MR. PREVIN: They intend to do serial class
9 certification briefing which is much more of a burden on
10 us, sort of in an open-ended way without reciprocal
11 discovery obligations. You know, that puts no -- that
12 puts all of the burden on us, no pressure on them and
13 that's unfair and sort of forces us into a box that's
14 just --

15 THE COURT: Uh-hum.

16 MR. PREVIN: -- that's not appropriate. So, I
17 mean, I think -- I've said my peace.

18 THE COURT: How about the middle of November?

19 MR. WITTELS: May I respond to that, your
20 Honor?

21 THE COURT: Uh-hum.

22 MR. WITTELS: I don't understand what defendant
23 really is saying here. This case is no different from
24 any large class action and to say that this is more
25 expensive than any other case, or any other involved

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1 case, they've engaged in a very large fraud here.

2 To ferret it out, and get all the discovery you
3 need takes time. We have the right to take ten fact
4 depositions of the employees, up to ten depositions of
5 non-parties. There's going to be a lot of pressure on
6 them if they don't feel enough pressure, we can put more
7 pressure on them. There's plenty of pressure on the
8 plaintiffs obviously to produce the named plaintiffs. We
9 didn't get any discovery demands from defendants until
10 last week on the plaintiffs. So I don't understand what
11 they mean by putting pressure on us.

12 If you put November in here, we'll be back here
13 in the end of the summer asking to extend it. It's
14 unrealistic in a large class action of this magnitude to
15 do it in the time frame that's been contemplated and
16 we're asking, you know, for a reasonable arbitrary, far
17 out date that we could try to meet. We're not sitting
18 around doing nothing. We've got demands going out and --

19 THE COURT: Let me tell you how I approach it
20 because I think we spent maybe 120 days arguing the case
21 involving Aeropostale about all of their e-mails. I
22 mean, it just -- it took a long time.

23 If I set the deadline as the middle of
24 November, it means that at that date, I will reassess
25 where discovery should go but it gives you some kind of

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1 -- it gives you a benchmark and also you have to trust me
2 that I'll be reasonable and I'll extend it, as
3 reasonable, but I won't give too much time if it's not
4 reasonable to do that. Okay? I mean, that's the only
5 way to do it. There's no way to really predict. If I
6 give you too long, then it will take too long to finish.
7 If I give you too short, it's going to make your lives
8 miserable and you'll just come back for more.

9 I mean, I have a case in front of -- that I
10 heard about recently where the parties were told that
11 they've got to go to trial in ten days and the discovery
12 had just ended. There was a motion pending and the
13 discovery was still going. I mean, this was in another
14 court. And the witnesses had to come from China.

15 So I mean I know that's not a reasonable way to
16 conduct a docket and that's not going to happen here but
17 at the same time, there have to be benchmarks and, you
18 know, we have -- in a case involving 18 states -- just
19 imagine what the Court's burden's going to be, how Judge
20 Garaufis is going to have to deal with a RICO class
21 certification and certification for 18 different states
22 in one particular motion. Obviously, you want to
23 bifurcate it so that you won't have to do all of that and
24 you think that that may not be such a good idea because
25 it may be more burdensome in the end. We'll have a

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1 better idea, I think in -- by November of how this case
2 should really be managed. You'll have more facts.
3 Discovery will be done.

4 MR. ALEXANDER: Make it work. Again, my only -
5 - I still am concerned that if we conduct discovery of
6 the plaintiffs now, we will not be waiving our
7 arbitration argument.

8 MR. MCINTURFF: If I may? We're not going to
9 challenge that. You raised your arbitration argument
10 initially.

11 MR. ALEXANDER: Okay.

12 MR. MCINTURFF: We're not going to do a
13 waiver --

14 MR. ALEXANDER: We're on the record here now.

15 THE COURT: We're on the record.

16 MR. ALEXANDER: Yeah, right.

17 MR. MCINTURFF: Yeah. No, we're not going to
18 challenge that.

19 THE COURT: You're not waiving your arbitration
20 argument.

21 MR. ALEXANDER: Okay.

22 THE COURT: Okay?

23 MR. ALEXANDER: I mean you can have other
24 arguments against arbitration,

25 MR. MCINTURFF: Yeah, yeah.

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1 MR. ALEXANDER: I understand that. But there
2 is case law --

3 MR. MCINTURFF: The waiver issue.

4 MR. ALEXANDER: -- about engaging in discovery
5 acting as a de facto waiver and I don't want that to be a
6 problem here.

7 THE COURT: There's also case law that says
8 that whatever judges say in certain context, really
9 doesn't mean anything. So the Supreme Court has told us
10 that. But you do have that stipulation right.

11 MR. ALEXANDER: Okay, okay.

12 THE COURT: Okay. So look, let me just tell
13 you, I'm going to try to work with you but where you
14 can't agree, I'm going to issue deadlines and guidance.
15 I'm going to try to do my best on this. But it's really
16 important that you continue to work together and try to
17 come up with schedules that make sense. And there's no
18 perfect solution here. Nobody's going to be totally
19 happy with everything. So the more you can do it, the
20 less I'll have to be the necessary evil.

21 MR. PREVIN: Your Honor, I apologize, maybe I
22 just need a little bit of clarification just on the named
23 plaintiff's deposition issue. I apologize. It's a
24 little -- I understood your ruling as to sort of the RICO
25 claim but given that -- sort of the uncertainty as to

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1 whether or not there will be a bifurcated class
2 certification briefing --

3 THE COURT: Uh-hum.

4 MR. PREVIN: -- it seems like that, if I
5 understood your ruling, controls whether or not we can
6 take the other named plaintiff's deposition. Did I
7 misunderstand that?

8 THE COURT: You mean the ones who are not RICO
9 representatives?

10 MR. PREVIN: Yes.

11 MR. MCINTURFF: The other six --

12 MR. PREVIN: Well, if we notice the additional
13 depositions and they say okay, we're just going to
14 withdraw them from the RICO claim --

15 THE COURT: Right.

16 MR. PREVIN: -- then I'm not quite sure where
17 we proceed. At that point, do we go to Judge Garaufis
18 and ask for a ruling?

19 THE COURT: No, you come back to me on the
20 discovery because there's a -- even if discovery is going
21 to be -- even if the briefing will be bifurcated, it
22 doesn't necessarily mean that the discovery has to be
23 bifurcated.

24 MR. PREVIN: Right.

25 THE COURT: And I think it's a -- in my book,

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1 it's a separate issue as to whether discovery continues
2 while a motion pends. And there are two schools of
3 thought but one school of thought is let's get as much of
4 that discovery done, so that as soon as one motion is
5 done, if it's bifurcated, then the second one can be teed
6 up and briefed.

7 MR. PREVIN: Okay.

8 THE COURT: Okay?

9 MR. PREVIN: Thank you, your Honor.

10 THE COURT: And I think that may make sense but
11 I really want to hear how this is playing out and how you
12 see the class claims for the different states.

13 Okay. Should we set a date for a conference in
14 November?

15 MR. WITTELS: Yes, your Honor.

16 Does the week of Thanksgiving work, before the
17 Thanksgiving, Monday, Tuesday, Wednesday?

18 THE COURT: It works for me. I don't know how
19 it works for everyone else.

20 MR. ALEXANDER: Wednesday is notoriously a
21 terrible day to travel.

22 THE COURT: Right.

23 MR. ALEXANDER: Monday or Tuesday but --

24 THE COURT: Okay. Is that better for you than
25 the week before?

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1 MR. ALEXANDER: I can do Monday and Tuesday.

2 THE COURT: Okay.

3 MR. ALEXANDER: If that's preference or the
4 week before except for the prior Monday.

5 THE COURT: All right. So the week before, I
6 can give you the 19th if you would like and I could give
7 you the morning or the afternoon, whichever is better.

8 MR. WITTELS: The 19th is fine, your Honor or
9 the 20th.

10 MR. PREVIN: I don't travel, so it won't matter
11 to me, your Honor.

12 MR. WITTELS: Which do you like?

13 MR. ALEXANDER: The 19th is fine.

14 THE COURT: Okay. Do you want 10:30 or do you
15 want noon or do you want 2 o'clock?

16 MR. ALEXANDER: I'd rather have noon. Noon
17 works very well for me, your Honor.

18 THE COURT: Okay.

19 MR. ALEXANDER: If that's all right.

20 MR. WITTELS: As well, your Honor, thank you.

21 THE COURT: All right. We're set. So we'll
22 make the 19th the discovery (indiscernible) date, too at
23 this point to be reconsidered at the next conference but
24 that will be the discovery deadline.

25 MR. WITTELS: Very well, your Honor.

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1 MR. MCINTURFF: Thank you.

2 MR. ALEXANDER: Thank you very much, your

3 Honor.

4 MR. MCINTURFF: Thank you for your time.

5 MR. PREVIN: Thank you.

6 THE COURT: Thank you.

7 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 16th day of July, 2015.


Linda Ferrara

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